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IN ARBITRATION PROCEEDINGS PURSUANT TO  
AGREEMENT BETWEEN THE PARTIES

In the Matter of A Controversy Between:	)	
	)	
	)	
	)	<u>ARBITRATION OPINION</u>
	)	<u>AND AWARD</u>
	)	(March 28, 2002)
	)	
And	)	BARBARA KONG-BROWN
	)	Arbitrator
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	)	
	)	
	)	
	)	Hearing Date: February 20,
	)	2002

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**INTRODUCTION**

This matter arises pursuant to agreement of the parties. Grievant contends that she was terminated without just cause. Management contends that Grievant's termination was warranted because she engaged in physical violence with a co-worker.

The undersigned was selected by the parties to conduct a hearing and render an arbitration award. The hearing was conducted on February 20, 2002, in Oakland, CA 94612. An oral record of the hearing was made by tape recording. At the hearing, the

parties were afforded an opportunity for examination and cross-examination of witnesses and for introduction of relevant exhibits. The dispute was deemed submitted on March 15, 2002, the date the final posthearing brief was received.

## **ISSUES**

The issue to be resolved is whether Management had just cause for discharge of Grievant. If not, what is the appropriate remedy?

## **FACTUAL ANALYSIS AND DISCUSSION**

### 1. Facts Giving Rise to the Dispute

This case concerns Grievant, an \_\_\_\_\_ employee since 1988. Grievant was a licensed vocational nurse on the nursing staff at \_\_\_\_\_ Hospital. . On July 9, 2000, she was involved in a physical altercation with \_\_\_\_\_ a co-worker. On July 18, 2000 Grievant was advised by her supervisor, of an intent to terminate her Employment. (C-1, p. 2). A \_\_\_\_\_ meeting was conducted on August 9, 2000, and on August 10, 2002, the Grievant \_\_\_\_\_ was advised that she was being terminated for Violation of Workplace Violence (Engaging in physical altercation with a fellow employee). The termination was effective August 25, 2000.

The Grievant \_\_\_\_\_ testified that she has no prior history of workplace violence and this was an isolated incident. She stated that the only discipline in her record concerns an absentee problem in 1992, which was resolved. She also had nine absences in 1996, sixteen absences in 1997, twelve absences in 1998, and fifteen absences in 1999. (A-4, A-5). At the time of incident, the Grievant \_\_\_\_\_ was aware of the County's policy on workplace violence and signed a verification acknowledging understanding of the policies and procedures pertaining to prevention of workplace violence. (C-3)

Relevant portions of the Workplace Violence Prevention Policy state the following:

DEFINITIONS. Acts or Threats of Violence include physical assaults and actions or statements which, either directly or indirectly, by words, gestures, symbols, intimidation, or coercion give reasonable cause to believe that the personal safety of the affected individual or others may be at risk. Intimidation includes behavior which has the purpose or effect of inspiring fear in a reasonable person and/or has the purpose or effect of inhibiting speech or actions by an act or threat of violence.

Remedial Action includes but is not limited to discipline up to and including termination of employment and criminal prosecution.

PROCEDURE. Policy Violations. Employee violations of this policy are subject to remedial action which may include immediate termination of employment.

In 1998, \_\_\_\_\_ came to work in Grievant's department. The Grievant testified that Ms. \_\_\_\_\_ did not like her, and made continuing comments denigrating her femininity. This verbal abuse continued for at least a year prior to the altercation. She told her supervisor that both Ms. \_\_\_\_\_ and Witness \_\_\_\_\_ were calling her names and giving her dirty looks. A co-worker and friend of the Grievant \_\_\_\_\_, took cigarette breaks with her and personally observed Ms. \_\_\_\_\_ using abusive language to the Grievant. She heard Ms. \_\_\_\_\_ call Grievant a "big, black bitch, you look like Rue Paul." The friend \_\_\_\_\_ advised the Grievant to report the incident to her supervisor and they walked together to the supervisor's office. She waited outside while the Grievant went to talk to her supervisor. The supervisor stated she would talk to Ms. \_\_\_\_\_ but Ms. \_\_\_\_\_ continued to harass the Grievant. The Grievant recalls that Ms. \_\_\_\_\_ told her she "looked like a man", "You need to get

a facial”, and “You look like Rue Paul.” Two months prior to the altercation the Grievant also spoke to another supervisor to attempt to arrange intervention but nothing happened. On the night of the altercation Grievant stated that Ms. \_\_\_\_\_ made a comment to a co-worker, “Years ago, if a nurse got out of line, I would give them what they needed.” The Grievant understood this to be an implied threat against her by Ms. \_\_\_\_\_. That evening the Grievant stated that Ms. \_\_\_\_\_ confronted her and made provocative comments to her. The Grievant went to find a container of Ensure for a patient and further words were exchanged between the two woman, which resulted in the physical altercation.

The \_\_\_\_\_ provided testimony of a medical clerk at Highland General Hospital, who has been employed by the County for twelve years. Her job involved ordering supplies and she was assigned to the main nurse’s station on the night shift from 11:30 p.m. and 7:30. a.m. In 2000 she worked with Grievant and \_\_\_\_\_. She testified that she observed the physical confrontation between the Grievant and Ms. \_\_\_\_\_ on July 9, 2000 which occurred between 5:45 a.m. and 6:00 a.m. The witness stated she heard “Your Momma” and came out and saw Grievant grab Ms. \_\_\_\_\_ hair and start hitting her. She stated to the Grievant “You just had a baby. It’s not worth it.” She saw the Grievant holding Ms. \_\_\_\_\_ and told her to let go of Ms. \_\_\_\_\_. The witness heard the Grievant say “Who else wants some? I’m from Oak Town. I’m going to kick your ass again.” The witness stated she had not witnessed any prior conflict between the two women. Ms. \_\_\_\_\_ is 59 years of age, 120 pounds, and about 5’2” or 5’3”. This witness claimed to be friends with both women.

On cross-examination this witness admitted that she took her cigarette breaks with Ms. \_\_\_\_\_, that Ms. \_\_\_\_\_ drove her to BART, and she ate breakfast with Ms. \_\_\_\_\_ several times during the past eight month period. She also has had a prior conflict with the Grievant. . She also noted that the Grievant was bleeding around her nose and admitted she did not see how the altercation started.

The second witness , is a registered nurse, who has been with the Hospital since 1990 and she was in Unit 5E for the past five years. She is in charge of the licensed vocational nurses, and engages in patient care. She has worked with the Grievant for eleven years on the night shift. On the night in question the witness stated that she heard a loud noise and heard Ms. \_\_\_\_\_ say “Stop. You’re gonna’ lose your job.” She saw both Grievant and Ms. \_\_\_\_\_ holding on to each other. She saw Grievant was hitting Ms. \_\_\_\_\_ and had Ms. \_\_\_\_\_ hair. Ms. \_\_\_\_\_ held onto the Grievant and reached up and scratched her face. Two co-workers tried to separate them. In her written statement the witness stated that the Grievant and Ms. \_\_\_\_\_ were grabbing and hitting each other. Ms. \_\_\_\_\_ reached up to the Grievant and scratched her in her face. The Grievant’s back was to the wall while Ms. \_\_\_\_\_ was standing in front with her hands engaged in fighting. The Grievant was punching Ms. \_\_\_\_\_ in her face with a closed fist at the same time she was scratched by Ms. \_\_\_\_\_. Words were exchanged between both nurses.

The third witness, has been at the hospital, 5E, on the night shift for four years and has known the Grievant for three years. On the day of the incident the witness heard Ms. \_\_\_\_\_ say "Help." There was ensure liquid all over the floor and on the walls and on Ms. \_\_\_\_\_ face and Ms. \_\_\_\_\_ face was covered with blood.

None of the three witnesses saw how the altercation started.

## 2. Discussion

The Hospital contends that the overwhelming evidence is that the Grievant violated the workplace violence policy, that regardless of who started the fight, she was the aggressor by the time the witnesses arrived on the scene and made threatening remarks after the fight ended, that her testimony is not credible and it is policy to terminate employees who engage in physical altercations in violation of the policy.

The Grievant contends that she has no prior record of physical violence, that the incident involving Ms. \_\_\_\_\_ was a single, isolated incident, and Ms. \_\_\_\_\_, had verbally abused the Grievant for a period of one year prior to the incident, and management ignored the Grievant's complaints of Ms. \_\_\_\_\_ taunts on at least three occasions. Discipline should be remedial and termination is too harsh for Grievant who has an exemplary long-term record.

A review of the termination for alleged employee misconduct requires an analysis of several factors. First, has the hospital relied on a reasonable rule or policy as the basis for a disciplinary action? Secondly, was there prior notice to the employee,

express or implied, of the relevant rule or policy, and notice about potential discipline for a violation? In some instances, an alleged violation involves conduct so serious that all employees are presumed to be aware that the conduct would be inherently wrong. A third factor in the analysis is whether the disciplinary investigation was fairly and fully conducted without a predetermined conclusion? Fourthly, did the employee engage in the actual misconduct as charged by the hospital? Lastly, are there any countervailing or mitigating circumstances requiring modification if not reversal of the discipline imposed? For example, does the employee have substantial seniority and is there evidence of satisfactory performance over many years?

For the reasons that follow, the arbitrator concludes that in view of the total circumstances, the discharge cannot be upheld. However, in view of the severity of the conduct, no backpay is awarded

Regarding the preliminary issues, the policy against workplace violence is certainly a reasonable one and there is no dispute that the Grievant had clear notice of the rule expressed in the rules prohibiting work place violence. Witnesses stated that they told the Grievant she could lose her job for fighting. The Grievant also testified that she was aware of the policy against workplace violence. Given the Grievant's acknowledgement of this policy through her testimony and in writing (C-3), she knew that engaging in a physical altercation with a co-worker would subject her to discipline, including discharge. The Grievant also had an adequate opportunity to respond to the charges during the investigation phase.

On the merits, it is clear that the Grievant engaged in the actual misconduct by the altercation with Ms. \_\_\_\_\_ How the fight started or who

was the aggressor is unclear and is not dispositive of this case. Neither is the physical size of either the Grievant or Ms. \_\_\_\_\_. By the time any of the witnesses arrived on the scene both combatants were fully engaged in the altercation, although the Grievant claims that Ms. \_\_\_\_\_ pushed her fingers into the Grievant's nostrils, and that she backed up to get away from Ms. \_\_\_\_\_. According to one witness the Grievant's back was to the wall, and Ms. \_\_\_\_\_ was standing in front with her hands engaged in fighting. (C-1, p. 5). The Grievant was punching in her face with a closed fist at the time she was scratched by \_\_\_\_\_. The last inquiry is whether there are sufficient countervailing considerations to modify the discipline imposed by the hospital. seniority of twelve years is not enough to give pause in assessing the reasonableness of the penalty. However, the absence of any prior discipline for workplace violence is a factor to be given weight in determining the appropriate penalty. An additional mitigating factor to be considered is the absence of evidence concerning investigation of the Grievant's prior complaints to \_\_\_\_\_ regarding her issues with \_\_\_\_\_. The Grievant testified that on at least three occasions over the course of a year she complained to her supervisor about Ms. \_\_\_\_\_. The first occasion was about a year prior to the altercation when the Grievant told her supervisor that both Ms. \_\_\_\_\_ and Witness \_\_\_\_\_ were calling her names and giving her dirty looks. Witness \_\_\_\_\_, a co-worker and friend of the Grievant, took cigarette breaks with her and personally observed Ms. \_\_\_\_\_ using abusive language to the Grievant. She heard



Ms. \_\_\_\_\_ call the Grievant a “big, black bitch, you look like Rue Paul.”. The witness advised the Grievant to report the incident to her supervisor and they walked together to the supervisor’s office. The witness waited outside while the Grievant went to talk to her supervisor. The Grievant requested a transfer to another shift, which was denied. The second time she complained was when she had her evaluation. Nothing was done. The third time she complained was a few months prior to the altercation. The Grievant spoke to another supervisor and he tried to set up an appointment with Ms. \_\_\_\_\_ but nothing further came of it.

The hospital presented no evidence concerning any investigation of the Grievant’s complaints and requests for intervention with Ms. \_\_\_\_\_ prior to the altercation. Moreover, the policy for violations of the workplace violence policy does not mandate automatic termination and emphasizes remedial action .

Considering the evidence as a whole, the undersigned arbitrator believes Ms. \_\_\_\_\_ , over the course of a year prior to the altercation, provoked the Grievant , and on the night in question, provoked the altercation. The arbitrator is also persuaded by the evidence that the Grievant alerted management to her predicament with Ms. \_\_\_\_\_ and there was insufficient intervention by the Hospital , which could have prevented this altercation. This does not diminish the fact that the Grievant was actively engaged in the fight that ensued, and was not retreating or merely attempting to push Ms. \_\_\_\_\_ away. The Grievant had an opportunity to back away but she was provoked into the

fight. It also does not appear that Ms. \_\_\_\_\_ made any attempt to back away from the fight. According to one witness the Grievant's back was to the wall and Ms. \_\_\_\_\_ was standing in front with her hands engaged in fighting. Thus, both parties were fully involved in the fight and neither one attempted to back off.

However, the arbitrator is troubled by the lack of evidence by the hospital regarding investigation of the Grievant's complaints about Ms. \_\_\_\_\_ prior to the incident, which is a mitigating factor in this case. Verbal abuse is just as deadly, if not more so than physical abuse. There was no evidence concerning any efforts on the part of the hospital to address Grievant's concerns with Ms. \_\_\_\_\_. The testimony from a management representative stated that there was no interview of prior incidents between the two women and Ms. \_\_\_\_\_ was not present at the Hearing.

### **AWARD**

Based on the testimony and documentary evidence, and the findings and conclusions set forth above, the undersigned renders the following Award: The grievance is sustained in part and denied in part. The Grievant is to be returned to work without backpay. This reinstatement is further subject to the condition, that any further incidents of workplace violence involving the Grievant may subject her to immediate discharge.

Dated: March 27, 2002 \_\_\_\_\_

BARBARA KONG-BROWN, Arbitrator

Arbitrator